

May 26, 2004

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Re: *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's  
Rules to Facilitate the Provision of Fixed and Mobile Broadband  
Access, Educational and Other Advanced Services in the 2150-  
2162 and 2500-2690 MHz Bands*  
WT Docket No. 03-66  
**WRITTEN EX PARTE PRESENTATION**

Dear Ms. Dortch:

Luxon Wireless Inc. ("Luxon") submits this written *ex parte* presentation to voice its strong opposition to a proposal that is apparently circulating within the Commission that would allocate two new Multipoint Distribution Service ("MDS") channels to be auctioned to "new entrants." As Luxon understands it, spectrum for the two "new" 6 MHz channels would be taken from incumbent MDS and Instructional Television Fixed Service ("ITFS") licensees in the 2500-2590 MHz band. As a result, the 5.5 MHz channels in the Lower-Band Segment ("LBS") and Upper-Band Segment ("UBS") proposed by the Coalition would be reduced to 5.0 MHz channels. Luxon respectfully asks the Commission to reject this proposal given both the opportunities that exist now for "new entrants" to acquire spectrum assets via the secondary market, and the preclusive and dilatory consequences that the Commission's proposal would cause.

Luxon is itself a new entrant in the MDS/ITFS industry<sup>1</sup> and is actively tapping the secondary market to acquire ITFS spectrum rights.<sup>2</sup> Luxon fails to see the benefits of reducing the amount of spectrum licensed to incumbents in order to make that spectrum available in an auction.<sup>3</sup> In fact, there is ample MMDS and ITFS spectrum available in

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<sup>1</sup> Luxon was established in 2003 to acquire, deploy and commercially operate high-quality, carrier-grade wireless broadband services in the state of Florida and other areas. As a "true start-up" enterprise, Luxon focuses on serving residences and commercial businesses that are underserved – or unserved – by wired solutions such as DSL or cable modem. Luxon is dedicated to working with educational institutions to develop and provide advanced services such as video-on-demand and campus-wide intranets to benefit elementary, high school and college students.

<sup>2</sup> On May 21, 2004, Luxon filed an *ex parte* presentation in this proceeding supporting commercial eligibility for ITFS channels as a means to promote the secondary market. Luxon also filed Comments in ET Docket No. 03-237, stating (among other reasons) that the adoption of an "interference temperature" metric would inhibit licensees from realizing the benefits that a secondary market could create.

<sup>3</sup> To date, Luxon has agreed to spectrum lease terms with ITFS licensees in several markets and is in discussions with licensees in a number of additional markets.

the secondary market such that the Commission need not squeeze in 12 MHz of spectrum to support some future use. As one of the entities the Commission's proposal apparently is designed to help, Luxon respectfully submits that the existing secondary market is a much-preferred, market-driven approach to introduce new entrants to the wireless broadband business.

**There is an ample amount of MMDS and ITFS spectrum available in the secondary market.** The Commission's proposal might have merit if demand for spectrum exceeded supply. In Luxon's experience, the opposite is true. *First*, in most small to medium-sized markets where Luxon is seeking to lease or acquire spectrum, a majority of the five ITFS licensees do not currently have existing leasing arrangements with other operators. This situation is the result of the rejection of leases by WorldCom and others in their reorganization plans, and the expiration of long-term leases where the previous lease was not extended or renewed. Consequently, there is a ready supply of ITFS spectrum available for Luxon – and others active in the market – to lease. While Luxon believes that, from a commercial operator's perspective, more spectrum is always better, taking spectrum from incumbent licensees and auctioning it off would ultimately do more harm than good.

*Second*, Luxon believes that the MMDS and ITFS spectrum, under a revised bandplan such as the one proposed by the Coalition, could easily support more than one wireless broadband operator in a given market. In many of the markets where Luxon is acquiring spectrum, Nextel has acquired MMDS spectrum from WorldCom and presumably has sufficient spectrum to itself initiate wireless broadband services. It is important to note that Nextel might well be considered a "new entrant" in the MMDS and ITFS industry since it agreed to acquire spectrum only within the last 11 months.

*Third*, there is no indication that spectrum in other flexible-use services is not available in the secondary market. "New entrants" desiring ready access to spectrum could approach licensees in those services and purchase, partition, disaggregate or lease spectrum to deploy wireless broadband services. In sum, there is no need for the Commission to create an additional supply of MMDS spectrum because a sufficient supply of flexible-use spectrum already exists.

**An auction of "new" spectrum would likely preclude new entrants from acquiring spectrum.** Luxon believes that auctioning new spectrum would likely prevent new operators from entering the MMDS/ITFS arena, a result that is apparently at odds with the Commission's intentions. First, it is unclear whether Luxon would be eligible to participate in the auction since the definition of "new entrant" is not now known. Hence, to the extent Luxon does not acquire sufficient spectrum in the secondary market, it may be precluded from participating in the auction, and its plans to compete with incumbent DSL and cable broadband services would be undermined. Second, assuming Luxon could bid in the auction, Luxon would incur substantial additional costs in connection with auction participation. Luxon would suffer from the lost opportunity of waiting for the auction to take place with no assurance that it would be the high bidder. And if it

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were the high bidder, the monetary costs would be higher since Luxon would be supplementing its existing spectrum assets with the auctioned spectrum to access the same (or nearly so) amount of spectrum it can already acquire solely in the secondary market. To give an example, if Luxon were to acquire lease rights to six LBS/UBS channels under the Coalition plan, it would gain access to 33 MHz; under the Commission's proposal, the same six channels would yield only 30 MHz – a ten percent reduction in capacity that may need to be augmented by acquiring additional spectrum rights at auction.

Under this proposal, Luxon and other “new entrants” likely would be at a significant disadvantage to those bidders that have more substantial financial resources. Luxon's business plan is based on providing high-quality wireless broadband services to areas that are unserved or underserved by DSL and cable modem incumbents. If Luxon were forced to expend significant additional financial resources at auction in order to acquire spectrum to serve these areas – or is overbid by entities that have no desire to serve these areas – the public policy objectives of ubiquitous broadband service will be frustrated.

**An auction of “new” spectrum would delay new entry.** Luxon is currently in the midst of acquiring its ITFS spectrum rights, has agreed to terms with license holders in several markets, and plans to deploy broadband services as soon as possible. Those plans could be significantly delayed if Luxon must wait for an auction to fill out its spectrum capacity needs. As a new entrant now, Luxon should not be forced to delay or scale back its service plans while it waits for an auction – assuming it would be allowed to participate and would be the highest bidder.

**A spectrum reduction of this magnitude would undermine current and pending secondary market agreements.** As stated above, Luxon has agreed to terms with ITFS licensees in several markets. Luxon believes that reducing the amount of spectrum available to licensees would potentially upset its spectrum leases, would reduce the amount of compensation Luxon could offer licensees, and would ultimately adversely affect the educators to whom ITFS spectrum was intended to serve. In several markets, Luxon has negotiated terms that include a substantial service component (Internet access and other advanced services). Decreasing the amount of spectrum could reduce the capacity and number of services that Luxon could provide under its leases, and in some cases would change the economics of the relationship significantly enough to affect the licensee's ability to meet its educational needs.


**The proposed spectrum reduction would present technical issues that would increase costs or reduce services.** In addition, Luxon is concerned that the Commission's proposal does not fully appreciate the technical issues associated with further reducing the channel bandwidth to 5.0 MHz. This further reduction would cause many equipment manufacturers to re-configure or re-engineer their equipment, potentially at considerable expense and delay. Moreover, this reduction could require Luxon to choose new vendors, re-design its systems, and would quite possibly necessitate an increase in the number of base stations Luxon must deploy to effectively serve an area.

Luxon estimates that each reduction of 0.5 MHz would result in at least a 1.6 Mbps loss in throughput for each base station sector in its system as currently designed. Obviously, this would lead to a higher cost structure for Luxon's services and limit Luxon's ability to meet its customers' needs.

**Taking spectrum from incumbent licensees would violate the law.** In addition to the policy, business and technical issues discussed above, Luxon agrees with the Wireless Communications Association International, Inc. that the lack of any notice that spectrum could be taken from incumbent licensees for new MMDS channels to auction would violate the Administrative Procedures Act.<sup>4</sup>

In conclusion, the secondary market for MMDS and ITFS is currently viable and active. In addition to Nextel, there are a number of other new entities acquiring spectrum rights, even in the small and medium-sized markets Luxon has targeted. The Commission's apparent desire to reclaim spectrum from existing spectrum holders to make available to new entrants serves no purpose where there is already a sufficient supply of spectrum that is being leased to "new entrants" right now. Indeed, as Luxon submits, setting aside the "new" spectrum for auction could potentially preclude or delay the ability of new entrants to deploy new wireless broadband services.

Sincerely,



Brian W. Gortney, II  
President/CEO

cc: Chairman Michael K. Powell  
Commissioner Jonathan S. Adelstein  
Commissioner Kathleen Q. Abernathy  
Commissioner Michael J. Copps  
Commissioner Kevin J. Martin  
John B. Muleta  
Bryan Tramont  
Sheryl J. Wilkerson  
Samuel Feder  
Jennifer Manner  
Paul Margie  
Barry Ohlson  
Catherine W. Seidel  
Joel D. Taubenblatt  
John J. Schauble  
Uzoma Onyeije

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<sup>4</sup> See Wireless Communications Association International, Inc., *Ex Parte* Presentation, filed May 25, 2004.